

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

DEC 15 1976

MICHAEL RODAK, JR., CLERK

NO. **76-673**

JOSHUA CAZARES, JOYCE CAZARES,
KAY L. SULLIVAN, WILLIAM J. PIERCE
and GENEVIEVE J. PIERCE,

Appellants

v.

STATE OF INDIANA, GOVERNOR OTIS
BOWEN, LIEUTENANT GOVERNOR ROBERT
D. ORR, TREASURER JACK L. NEW,
AUDITOR MARY AIKENS CURRIE and
ALL MEMBERS OF THE INDIANA 99th
GENERAL ASSEMBLY

Appellees.

**ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**MOTION TO DISMISS OR AFFIRM
OR BRIEF IN OPPOSITION TO CERTIORARI**

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The Appellees move the Court to dismiss the appeal herein since this Court has no jurisdiction to review the judgment of the United State Court of Appeals for the Seventh Circuit in this cause pursuant to 28 U.S.C. §1254 (2), in that the judgment did not hold a State statute to be invalid as repugnant to the Constitution or laws of the United States. If this Court determines that jurisdiction in this cause is conferred by the provisions of 28

U.S.C. § 1254(2), then the Appellees request this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the ground that it is manifest that the question on which the decision of the cause depends is so inconsequential and of such little substance as not to need further argument. In the alternative if this Court finds 28 U.S.C. § 2103 applicable and treats this appeal and acts upon it as a petition for writ of certiorari, then the Appellees request this Court to consider their response as a Brief in Opposition to Petition for Writ of Ceritorari.

NATURE OF PROCEEDING

Plaintiffs commenced this lawsuit on January 6, 1976, alleging jurisdiction pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 1981 *et seq.* and on 28 U.S.C. § 1343 *et seq.* requesting the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) to issue an injunction mandating appropriations by the General Assembly of Indiana for additional judges and facilities, the redistricting and reapportionment of the appellate courts, and the alleviation of the alleged backlog of pending appeals. In addition, the Plaintiffs sought One Hundred and Fifty Million Dollars (\$150,000,000.00) in damages and Five Million Dollars (\$5,000,000.00) in attorney fees. The District Court dismissed this cause on six grounds. (See Appellants' Jurisdictional Statement, A-5—A-7). On August 17, 1976, the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) affirmed the judgment of the District Court because it presented a non-justiciable "political question" without finding it necessary to reach the other grounds upon which the District Court's judgment was rendered. (See Appellants' Jurisdictional Statement, A-3).

ARGUMENT

I.

JURISDICTION IN THIS CAUSE NOT CONFERRED BY 28 U.S.C. § 1254(2)

In the Appellants' Jurisdictional Statement the contention is made that jurisdiction is conferred in this cause by the provision of 28 U.S.C. § 1254(2) which permits an "appeal by a party relying on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." In that regard, Appellants state on page 4:

In the course of their opinion the Court of appeals stated with regard to the matter of collecting damages for unreasonable delay in the decision of appellate matters that determining a general rule in civil cases is even more difficult because there is no constitutional right, as there is under the Sixth Amendment, to a speedy trial.

By so doing, the Court ignored the Indiana constitutional provision for a speedy trial cited in Appellants' Court of Appeals brief and apparently held it for naught. As a result the people of Indiana are left with a situation in which the meaning of their constitutional provision is obscure in reference to the Fourteenth Amendment to the U.S. Constitution. (Emphasis supplied).

The Appellants only authority cited in support of their jurisdictional contention is the decision of this Court in *Watson v. Employers Liability Assurance Corp.* 348 U.S. 66 (1954). In *Watson, supra* this Court held that an appeal pursuant to 28 U.S.C. § 1254(2) was proper since the

United States Court of Appeals for the Fifth Circuit had *specifically* held Louisiana statutory provisions unconstitutional.

In the case at bar the Seventh Circuit affirmed the District Court's dismissal without holding an Indiana statutory or constitutional provision repugnant to the Federal Constitution. Specifically, the Seventh Circuit concluded that the allegations of the Complaint presented a non-justiciable "political question." (Appellants' Jurisdictional Statement, A-1—A-5).

As this Court stated in *Public Service Commission of Indiana et al., v. Batesville Telephone Co.*, 284 U.S. 6 (1929) at page 7:

The plain intent of this statute [presently 28 U.S.C. § 1254(2)] is to limit appeals to this Court from a Circuit Court of Appeals to cases where its decision is against the validity of statute of a State upon the ground of its being repugnant to the Constitution, treaties, or laws of the United States. In other cases, review by this Court if it be had, must be pursuant to a writ of certiorari duly applied for and granted.

The term "state statute" as used in 28 U.S.C. § 1254(2) has been found by this Court to include state constitutional provisions. *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1957).

Since the Seventh Circuit did not find a state statute repugnant to the Federal Constitution as prescribed by 28 U.S.C. § 1254(2), this appeal is improvidently taken and should be dismissed.

II.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

If this Court determines that the appeal should not be dismissed, the Appellees would request that the decision of the Seventh Circuit be affirmed in that the case presents no substantial question not previously decided by this Court.

The Seventh Circuit concluded that Count I of the Plaintiffs' Complaint, which sought an injunction declaring unconstitutional portions of the Indiana Constitution governing intermediate courts and mandating the restructuring of the state appellate court system, was properly dismissed as presenting a non-justiciable "political question." The decision of the Seventh Circuit in affirming the dismissal of Count I of the Complaint is consistent with the affirmance of dismissals by other Court of Appeals in causes similar to the one at bar. *Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts*, 488 F.2d 1241 (1st Cir. 1973) *cert. denied* 416 U.S. 986 (1974); *DeKosenko v. State of New York*, 427 F. 2d 351 (2d Cir. 1970).

Also, the Seventh Circuit concluded that Count II of the Complaint, which sought One Hundred and Fifty Million Dollars (\$150,000,000.00) in damages, was properly dismissed because standards do not exist to enable the judiciary to determine when delay creates a cause of action for damages.

The decision of the Seventh Circuit is consistent with the rulings of this Court on the application of the political question doctrine. *Gilligan v. Morgan*, 413 U.S. 1 (1973);

Baker v. Carr, 369 U.S. 186 (1962). The political question doctrine is premised on the theory that a court should not consider disputes for which they lack special competence or judicially ascertainable standards. *Powell v. McCormack*, 395 U.S. 486 (1969). This Court has found that the federal courts should not interfere or supervise the financing and organization of state and local governments. See *O'Shea v. Littleton*, 414 U.S. 488 (1974).

It is clear from the above cases that if this Court finds jurisdiction for this appeal the Appellants herein present no substantial question not previously decided, and that the Seventh Circuit correctly affirmed the decision of the District Court.

III.

IF COURT APPLIES 28 U.S.C. § 2103 THEN CERTIORARI SHOULD BE DENIED

Although it is clear that this appeal is improvidently taken, the Appellees recognize that this Court may treat and act upon this appeal as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2103. In section II. above, the Appellees presented the reasons why the Seventh Circuit's affirmance of the District Court's dismissal was proper. Those reasons also are applicable and establish the reasons why a writ of certiorari should be denied. Therefore, in order to avoid repetitious arguments, the Appellees request this Court to examine those sections as if fully set out and reiterated herein.

In addition, the Appellants have not pleaded or shown any conflict between the circuit courts on the issue involved herein, nor have they shown any conduct on the part of the lower courts which would require the exercise of this

Court's supervisory powers. Thus, this Court should deny a petition for a writ of certiorari in this cause.

CONCLUSION

For these reasons, the appeal herein should be dismissed. If this Court determines it has jurisdiction, then the decision of the Seventh Circuit should be affirmed. If this Court treats the Jurisdictional Statement as a Petition for Writ of Certiorari, then the petition should be denied.

Respectfully submitted,

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